

## Rep. Nadler: FISA Amendments Act Balances Security and Liberty

Thursday, 13 March 2008

WASHINGTON, D.C. &ndash; Congressman Jerrold Nadler (NY-08), Chair of the Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties, today urged his colleagues to adopt H.R. 3733, the FISA Amendments Act. That bill is expected to be voted on today. On Thursday evening, the House held a rare closed session to discuss surveillance legislation in a classified setting in light of Republican claims that they had important secret information.

&ldquo;It is time to reject the scare tactics of the Bush Administration and enact this carefully crafted legislation,&rdquo; said Rep. Nadler. &ldquo;Last night, behind closed doors, the House met to consider this important issue. Yet nothing was revealed that would support the overreaching changes sought by the White House. Our legislation gives our intelligence agencies all the tools they need to defend our country consistent with the Constitution. If the President is serious about protecting America, he should drop his objections to this bill.&rdquo;

Specifically, the House bill creates new authorities for the government to conduct electronic surveillance of foreign targets. But because some foreign surveillance may record conversations with Americans, the bill requires that when the Government proposes to undertake surveillance of a foreign group or entity, it must first apply to the FISA court. However, the bill states that in an emergency, the surveillance can begin immediately, and the court can consider the surveillance procedures later.

The bill also does not provide retroactive immunity for the telecommunications firms that may have broken the law when they participated in the Bush Administration&rsquo;s warrantless wiretapping program. However, it will allow the telecoms to assert their immunity, and to present the relevant documents and evidence to the court in a secret session that protects any valid &ldquo;state secrets.&rdquo; The courts can then judge whether the telecom company obeyed the law &ndash; in which case it has complete immunity &ndash; or did not.

Also, the bill would create a bi-partisan, National Commission to investigate the President&rsquo;s warrantless wiretapping program. That Commission would have the power to subpoena documents and testimony.

&ldquo;If you put aside the rhetoric of the White House and the minority, it is clear that our bill properly balances security and liberty,&rdquo; Rep. Nadler added. &ldquo;It also demands that these extraordinary powers are used properly, and that they follow our laws and our Constitution. I urge all my colleagues to support the adoption of this bill.&rdquo;

Congressman Nadler&rsquo;s full statement for the record on H.R. 3733, the FISA Amendments Act, follows:

&ldquo;Mr. Speaker, I rise in strong support of H.R. 3733, the FISA Amendments Act. This carefully crafted legislation gives our intelligence agencies all the tools they need to protect our country, while protecting our fundamental civil liberties.

&ldquo;Mr. Speaker, let us be clear about what this legislation does not do. It does not require individual warrants for the targeting of foreign terrorists located outside the United States. For three decades, that has been the law, and it will still be the law under this bill. There is no dispute about this.

&ldquo;The bill starts with the recognition that the intelligence community needs to surveil all members of a terrorist group &ndash; once that group is identified. Any suggestion that it requires individualized warrants to intercept

communications of terrorists overseas is wrong.

"The bill maintains the traditional requirement of a warrant when our intelligence agencies seek to conduct surveillance on Americans. And because some foreign surveillance may record conversations with Americans, the bill requires that, when the Government proposes to undertake surveillance of a foreign group or entity, it must first apply to the FISA court, except that, in an emergency, the surveillance can begin immediately, and the court can consider the surveillance procedures later.

"In both this bill and the Senate bill, the Government has to inform the court of the procedures it will use to ensure that it is targeting only foreigners overseas and how it will "minimize" domestic information it might inadvertently pick up. The only real difference is that the Senate bill lets them listen first, then go to the court within 5 days. This bill requires that they go to the FISA Court first. But in an emergency, we give them 7 days to listen before they go to the court. So will someone please tell me how this minor difference between the bills somehow gives rights to terrorists?

"There is one thing that this bill does not do, and this great body must not do — provide blanket, retroactive immunity to the telecommunication companies that assisted in the President's warrantless wiretapping program. Such a move would fly in the face of our notions of justice.

"Mr. Speaker, in the last few weeks, we have heard countless assertions from our colleagues on the other side that are false and misleading. They claim that we allowed the Protect America Act to expire — when it was the Republicans who blocked attempts to extend that legislation temporarily. And they continue to claim that retroactive immunity for the telecom companies is necessary for the security of the country. But they have failed to provide any evidence for that claim.

"The telecom companies aided the Administration's surveillance program. Some people — American citizens — believe their constitutional rights were violated, and brought suit against the government and the telecom companies. There are two narratives here. One is that the telecom companies patriotically aided the Administration in protecting Americans from terrorists. The other is that the telecom companies conspired with a lawless Administration to violate the Constitutional rights of Americans. Which of these narratives is correct is for a court to decide.

"It is not the role of Congress to decide legal cases between private parties. That is why we have courts. If the claims are not meritorious, the courts will throw them out. But if the claims do have merit, we have no right to dismiss them without even reviewing the evidence.

"We are told that the telecom companies should not be subject to lawsuits for doing their duty. But whether they were doing their duty, or abusing the rights of Americans, is precisely the issue. And that is a legal issue for the courts to decide.

"In any event, the existing law, in a wise balance of national security and constitutional rights that this bill does not change, already provides absolute immunity to the telecom companies if their help was requested, and if they were given a statement by the Attorney General, or various other government officials, stating that the requested help did not require a warrant or court order and would not break the law. They have immunity whether those statements were true or not. They can rely absolutely on the government's assertions.

"So why do they think they need retroactive immunity? Because of the Administration's sweeping assertion

of the 'state secrets' doctrine, which has prevented the companies from claiming their immunity.

'Title II of this bill will allow the telecoms to show the courts, in a secure setting, if they were obeying the law or if they weren't. It will allow the telecom companies to assert their immunity in court, and to present the relevant documents and evidence to the court in a secret session that protects any 'state secrets.' The courts can then judge whether the telecom company obeyed the law — in which case it has complete immunity — or whether it did not. And, I remind you, that 'following the law' means simply obtaining a statement from the government that the company's help is needed, and that the requested help does not require a court order or violate the law. A company that assisted in spying on its customers without getting that simple assurance does not deserve immunity.

'Mr. Speaker, this bill gives our intelligence agencies what they say they need. But it also demands that their extraordinary powers be used properly, and that they follow our laws and our Constitution. This bill will help limit this Administration's disregard for the rule of law. It is a carefully crafted measure, and deserves the support of every member in this body.

'I yield back the balance of my time.'

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